

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

Plaintiff,

No. CR 04-00317 MHP

V.

CHARLES EDWARD LEPP,

**Defendant.**

**MEMORANDUM & ORDER**

**Re: Motion to Admit Evidence from the  
2004 Search; Motion to Suppress Fruits  
of 2005 Search Warrant; Motion to  
Suppress Evidence based on the Sixth  
Amendment; Motion to Dismiss for  
Outrageous Governmental Conduct;  
and Motion to Reconsider RFRA Ruling**

On August 17, 2004 a magistrate judge issued a warrant for the search of defendant Lepp's properties ("2004 warrant"). As a result of evidence obtained during the August 18, 2004 search of Lepp's properties ("2004 search"), Lepp was indicted.

In January, 2005 the government conducted a sting operation through which they were able to purchase one pound of marijuana from Lepp.

On February 11, 2005 the government applied for and received another search warrant for Lepp's properties ("2005 warrant"). Based on the fruits of a search executed on February 16, 2005 ("2005 search"), Lepp was charged with four additional counts in a superceding indictment.

On December 12, 2006 this court issued an order declaring the 2004 warrant defective and suppressing all evidence obtained in the 2004 search. See Docket No. 150. The government now

1 moves for the admission of evidence found in plain view during the 2004 search. Concurrently,  
2 Lepp moves to: 1) suppress fruits of the 2005 warrant due to a lack of probable cause; 2) suppress  
3 fruits of the 2005 warrant based on violations of the Sixth Amendment; 3) dismiss the distribution  
4 count in the superceding indictment due to outrageous governmental conduct; and 4) reconsider one  
5 of its earlier rulings. Having considered the parties' arguments and for the reasons set forth below,  
6 the court issues the following memorandum and order.

7

8 Motion to Admit Evidence Found in Plain View During the 2004 Search

9 I. Background

10 On August 18, 2004 federal, state and local officers executed a warrant on four of Lepp's  
11 properties in Upper Lake, California, seizing more than 32,000 marijuana plants and items related to  
12 the packaging, processing and weighing of marijuana and hash. Two of the properties  
13 searched—941 East Highway 20 and 975 East State Highway 20—are adjoining rural premises on  
14 the south side of East Highway 20 ("Rural Property"). Def.'s Evid. Exh. D. The other two—9175  
15 Upper Lake Lucerne Road and 9176 Upper Lake Lucerne Road—are adjoining residential premises  
16 on the north side of Highway 20 ("Residential Property"). Id. According to the government's  
17 papers, officers found 24,784 marijuana plants on the Rural Property. The remainder of the plants  
18 were found on the Residential Property.

19 The Rural Property is a flat, rectangular field accessed by a private dirt road that intersects  
20 with Highway 20. Id., Exh. N. The dirt road follows the rectangular boundary of the Rural  
21 Property, allowing one to drive around the entire field. Id. A perimeter fence marks the outer edge  
22 of the field, separating it from the dirt road and neighboring properties. Id. However, the fence  
23 contains several large gaps, allowing vehicles to drive from the dirt road into and across the field.  
24 Id., Exh. M. At the time of the search, the field contained several thousand marijuana plants, the  
25 largest of which were on the southern end of the field, farthest away from Highway 20. Id. The  
26 marijuana plants closest to Highway 20 were on the northern end of the field and were smaller,  
27 ranging from a few inches to a foot in height. Id. There were no permanent structures on the Rural  
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1 Property at the time of the search. Id.

2 In contrast to the Rural Property, the Residential Property consists of hilly terrain and  
3 moderate-to-heavy vegetation cover. Id. The driveway leading to the Residential Property is  
4 accessed via Upper Lake Lucerne Road, which intersects with Highway 20 approximately 400 feet  
5 northwest of the Rural Property. Id., Exh. P. A large locked gate featuring a “No Trespassing” sign  
6 blocks access to the driveway leading to the Residential Property. Govt.’s Evid. Exh. 5. At the time  
7 of the search, there were several permanent structures on the Residential Property, including Lepp’s  
8 home. Id., Exh. 6.

9 On December 12, 2006 this court held that the 2004 search was based on a defective warrant  
10 and therefore suppressed all evidence found on both the Rural Property and Residential Property.  
11 See Docket No. 150. The government now moves for admission of evidence seized on the Rural  
12 Property by making two arguments in support: 1) marijuana growing on the northern end of the  
13 Rural Property was in plain view of officers standing on Highway 20; and 2) evidence seized from  
14 the Rural Property is admissible under the open fields doctrine. Each argument is considered in turn  
15 below.

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17 II. Legal Standard

18 The Fourth Amendment protects citizens from unreasonable searches and seizures. U.S.  
19 Const. amend. IV. “The touchstone of Fourth Amendment analysis is whether a person has a  
20 ‘constitutionally protected reasonable expectation of privacy.’” California v. Ciraolo, 476 U.S. 207,  
21 211 (1986) (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). This  
22 requires “a two-part inquiry: first, has the individual manifested a subjective expectation of privacy  
23 in the object of the challenged search? Second, is society willing to recognize that expectation as  
24 reasonable?” Id. The plain view and open fields doctrines limit Fourth Amendment protections by  
25 narrowing the scope of objectively reasonable privacy interests.

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#### A. Plain View Doctrine

Under the plain view doctrine, “[o]nce an officer has observed an object in ‘plain view,’ the owner’s privacy interest in that object is lost.” United States v. Bulacan, 156 F.3d 963, 968 (9th Cir. 1998). Thus, “when an obviously incriminating object is found in plain view, it may be seized without a warrant.” Id. (citing Texas v. Brown, 460 U.S. 730, 739 (1983)). However, the plain view doctrine is subject to two important limitations. First, it is limited “to situations where the officer had a legal right to be at the location from which the object was plainly viewed.” Id. (citing Horton v. California, 496 U.S. 128, 436 (1990)). Second, the seizure is not justified unless the officer had “a lawful right of access to the object itself.” Horton, 496 U.S. at 136. Without a lawful right of access, “even where the object [in plain view] is contraband . . . the police may not enter and make a warrantless seizure.” Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971).

#### B. Open Fields Doctrine

Under the open fields doctrine, “an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.” Oliver v. United States, 466 U.S. 170, 178 (1984). Thus, the zone of Fourth Amendment protection does not necessarily extend up to an individual’s property boundary; only the curtilage—“the land immediately surrounding and associated with the home”—is shielded from unreasonable searches and seizures. Id. at 180 & n.11; see also United States v. Barajas-Avalos, 377 F.3d 1040, 1057 (9th Cir. 2004). What lies beyond the curtilage are open fields that are generally not within the zone of Fourth Amendment protection. Oliver, 466 U.S. at 179–80; Barajas-Avalos, 377 F.3d at 1056–57.

22 There is no fixed formula for distinguishing between curtilage and open fields. Nonetheless,  
23 in United States v. Dunn, 480 U.S. 294 (1987), the Supreme Court identified four factors that are  
24 relevant to this determination: (1) “the proximity of the area claimed to be curtilage to the home”;  
25 (2) “whether the area is included within an enclosure surrounding the home”; (3) “the nature of the  
26 uses to which the area is put”; and (4) “the steps taken by the resident to protect the area from  
27 observation by people passing by.” Id. at 301 (citations omitted).

1       Although the distinction between curtilage and open fields is useful under certain  
2 circumstances, it is not necessarily dispositive in determining whether an area is protected by the  
3 Fourth Amendment. The Supreme Court has made clear that what an individual “seeks to preserve  
4 as private, even in an area accessible to the public, may be constitutionally protected.” Katz, 389  
5 U.S. at 351. Thus, where an individual seeks to preserve an open field as private—for example, by  
6 erecting barriers and clearly marking the area as private—Fourth Amendment protections may  
7 apply, notwithstanding that the field is outside of the curtilage.<sup>1</sup> As such, the open fields analysis  
8 requires the court to ask two questions: (1) is the area in question within the protected curtilage?;  
9 and (2) has the individual implemented sufficient measures to preserve his or her field as private? If  
10 either of these questions is answered in the affirmative, Fourth Amendment protections apply.

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12       III.     Discussion

13           A.     Plain View from the Highway

14       According to the government, the marijuana plants on the northern end of the Rural  
15 Property—approximately 25 to 200 yards from Highway 20 by varying accounts—were plainly  
16 visible to police officers before they initiated the search. Lepp disputes the government’s argument,  
17 claiming it lacks credibility because no officer claimed to have seen marijuana from Highway 20  
18 until after the court suppressed all evidence from the 2004 search.

19       Assuming arguendo that the officers did in fact see the marijuana from the Highway 20, the  
20 government must still prove that it had a lawful right of access to the object itself, namely access to  
21 the Rural Property. In order to make this showing, the government relies on the open fields  
22 doctrine. Since the marijuana plants on the Rural Property would obviously be in plain view if the  
23 government was legally on the Rural Property, the court focuses on that dispositive analysis below.

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25           B.     Open Fields

26       Under the open fields doctrine, if Lepp did not have a reasonable expectation of privacy in  
27 his Rural Property, officers were entitled to trespass onto the Rural Property. To determine Lepp’s

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1 reasonable expectation of privacy, the court must assess not only whether the property was within  
2 the curtilage as defined by Dunn, but also whether Lepp implemented measures to preserve the  
3 property as private.

4           1.       Curtilage

5           a.       Proximity to the Dwelling

6           The first Dunn factor is the proximity to the dwelling of the area claimed to be curtilage. 480  
7 U.S. at 301. Application of this factor requires a case-by-case inquiry into the nature of the property  
8 searched. Johnson, 256 F.3d at 902. While “there is not any fixed distance at which curtilage ends,”  
9 United States v. Depew, 8 F.3d 1424, 1427 (9th Cir. 1993), as a general rule the extent of the  
10 curtilage on rural properties will be greater than in a densely populated urban setting. See Johnson,  
11 256 F.3d 902. Nonetheless, even in rural areas, it is rare for curtilage to extend more than 100 feet  
12 beyond the home. See, e.g., Dunn, 480 U.S. at 297, 302 (holding that deputies who approached  
13 within 90 feet of a rural residence were not within the curtilage); United States v. Van Damme, 48  
14 F.3d 461, 464 (9th Cir. 1995) (200 feet is outside the curtilage); United States v. Brady, 993 F.2d  
15 177, 178 (9th Cir. 1993) (45 feet is outside the curtilage); United States v. Traynor, 990 F.2d 1153,  
16 1158 (9th Cir. 1993) (overruled on other grounds in United States v. Johnson, 256 F.3d 895 (9th Cir.  
17 2001)) (70 to 75 feet is outside the curtilage); United States v. Calabrese, 825 F.2d 1342, 1350 (9th  
18 Cir. 1987) (50 feet is outside the curtilage). But cf. United States v. Furrow, 229 F.3d 805, 817 (9th  
19 Cir. 2000) (holding that the district court did not clearly err in finding a distance of 100 feet within  
20 the curtilage); Depew, 8 F.3d at 1427 (distance of 50 to 60 feet is within the curtilage).

21           Here, although the exact distance between the Rural Property and Lepp’s home is not clear,  
22 the two are at least 250 feet from each other. They also have different addresses and are located on  
23 opposite sides of East Highway 20. Lepp disputes the importance of this distance, contending that  
24 because he can observe the Rural Property from his home, the property is within the curtilage.  
25 Lepp’s argument, however, misinterprets the curtilage analysis. Lepp’s ability to view the property  
26 does not mitigate the fact that it is located a substantial distance from his home. Furthermore, access  
27 to the Rural Property from Lepp’s home requires crossing a paved highway accessible to the public.

1 Thus, the first Dunn factor favors a finding that the Rural Property is outside the curtilage of Lepp's  
2 home.

3                   b.        Enclosures

4                  The second Dunn factor requires the court to consider whether the area searched is included  
5 within any enclosure surrounding the home. 480 U.S. at 302. As the Court observed in Dunn, the  
6 boundaries of the curtilage will typically be "clearly marked" and "easily understood from our daily  
7 experience." 480 U.S. at 302. The most commonly encountered lines of demarcation are gates and  
8 fences, which the Court characterized as "important factors in defining the curtilage." Id. at 301 n.  
9 4; see also Johnson, 256 F.3d at 902. However, a "perimeter fence" will rarely be relevant in  
10 determining the extent of the curtilage. See, e.g., Traynor, 990 F.2d at 1158; see also United States  
11 v. Van Damme, 48 F.3d 461, 464 (9th 1995) (holding that a perimeter fence enclosing several acres,  
12 including a home and a greenhouse, did not demarcate the curtilage boundary).

13                 Here, the sole barrier enclosing the Rural Property, a wire fence, did not mark the boundary  
14 of the curtilage. It did not, for example, surround Lepp's home. As stated above, the Rural Property  
15 was across a publicly accessible road from Lepp's home. Instead, the wire fence served as a  
16 perimeter fence, marking the rectangular boundary of the field encompassed solely by the Rural  
17 Property. Moreover, because the fence was made of see-through wire and had several large gaps, it  
18 did not block the public from observing or accessing the field. Thus, this factor also indicates that  
19 the Rural Property was not within the curtilage of Lepp's home.

20                   c.        Uses of Area Searched

21                 The third Dunn factor is the nature of the uses being made of the searched area. 480 U.S. at  
22 301. In applying this factor, the court is mindful that the curtilage analysis is directed toward  
23 determining "whether the area in question is so intimately tied to the home itself that it should be  
24 placed under the home's 'umbrella' of Fourth Amendment protection." Id.; see also Depew, 8 F.3d  
25 at 1427 n.2. This factor implies that a government agent must possess "prior objective knowledge of  
26 the property's use" before traveling onto the land "free of Fourth Amendment constraints." Johnson,  
27 256 F.3d at 903 (citing Depew, 8 F.3d at 1426–27; Calabrese, 825 F.2d at 1350).

1       Here, the Rural Property was not intimately tied to Lepp's home. Rather, the property served  
2 as a farm, and was located a substantial distance and across a state highway from Lepp's home.  
3 Moreover, before conducting the search, officers had received several tips that Lepp's property was  
4 being used to grow marijuana. Thus, this factor also indicates that the Rural Property was not within  
5 the curtilage of Lepp's home.

6                          d.     Steps Taken to Protect Area from Observation

7       The fourth and final Dunn factor requires the court to consider "the steps taken by the  
8 resident to protect the area from observation by people passing by." Dunn, 480 U.S. at 301. Here,  
9 Lepp did not take any discernable steps to protect the Rural Property from observation. The court is  
10 not aware of any "No Trespassing" signs posted on the property. Moreover, it appears that the  
11 private dirt road leading into the Rural Property was not blocked by a gate or a fence. Finally,  
12 although Lepp erected a perimeter fence, the fence was see-through and did not shield the property  
13 from public view or trespass. Thus, this factor also favors a finding that the Rural Property was not  
14 within the curtilage of Lepp's home.

15       In sum, having determined that each of the four Dunn factors weighs in favor of the  
16 government, the court finds that the Rural Property was not within the curtilage of Lepp's home.

17                          2.     Steps Taken to Preserve Area as Private

18       As discussed above, finding that an area is not part of the protected curtilage does not end the  
19 analysis. Where the owner has sought to preserve an area as private, it may be protected by the  
20 Fourth Amendment even if it is not within the curtilage of his home. The court has no trouble  
21 concluding that Lepp had a subjective expectation of privacy in the Rural Property. Indeed, the  
22 mere fact that Lepp challenges the search demonstrates that Lepp expected privacy. The issue  
23 before the court, then, is whether Lepp's expectation was one society is willing to recognize as  
24 reasonable.

25       Here, beyond erecting a perimeter fence, Lepp has taken no other steps to preserve the Rural  
26 Property as private. The perimeter fence surrounding the property does provide some measure of  
27 privacy, but the fence is see-through, allowing the public to observe the field. Moreover, there are  
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1 several large gaps in the fence which expose the field to public access. Thus, the court finds that  
2 Lepp did not have an objectively reasonable expectation of privacy in the Rural Property.  
3 Consequently, the government's motion to admit evidence seized on the Rural Property is granted.

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5 Motion to Suppress Fruits of 2005 Search Warrant

6 I. Background

7 On February 11, 2005 Magistrate Judge Maria Elena James issued a search warrant allowing  
8 for the search of premises described as “[s]ee Attachment I.” Def’s Evid. Exh. F. Attachment I  
9 particularly describes four pieces of property owned by Eddy Lepp. Id. Similarly, the concealed  
10 person or property to be searched was described as “[s]ee Attachment II,” which particularly  
11 described the property to be seized. Id.

12 This warrant was based upon an application that attached an affidavit by Agent Burkhart.  
13 Id., Exh. E. The application for the search warrant also identifies the premises to be searched as  
14 “[s]ee Attachment I,” which particularly identifies the premises to be searched. Id. The application  
15 left blank the section designated to identify the concealed person or property. The section on the  
16 warrant application describing facts demonstrating probable cause, however, incorporated the  
17 attached affidavits by reference, which requested a search warrant for the items described in  
18 Attachment II. Id., Burkhart Affidavit at 9.

19 Agent Burkhart’s affidavit also presented the following in support of probable cause: 1) Lepp  
20 told Agent Macanga he would begin replanting marijuana immediately after the 2004 search;  
21 2) aerial surveillance of property purportedly belonging to Lepp; 3) PG&E power usage records that  
22 indicated Lepp’s power usage was 26 times the “baseline”; 4) a sign displaying a marijuana leaf and  
23 entwined snake on the fence surrounding Lepp’s property; 5) the purchase of one pound of  
24 marijuana from Lepp; 6) previous 2002 search where three firearms, 9 kilograms of dried marijuana  
25 and 266 live marijuana plants were seized; and 7) previous 2004 search where a loaded firearm, 1.6  
26 kilograms of marijuana and 32,524 live marijuana plants were seized. Id. at 3–5.

27 Lepp now makes four arguments to quash the 2005 warrant: 1) failure to use words of  
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1 incorporation in the warrant application; 2) inadequate words of incorporation on the warrant; 3)  
2 failure to provide Lepp with the warrant attachments at the time of search; and 4) a lack of probable  
3 cause. Each argument is discussed in turn.

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5 II. Legal Standard

6 A magistrate properly finds that probable cause exists when, “considering the totality of the  
7 circumstances, there is a fair probability that contraband or evidence of a crime will be found.”  
8 United States v. Reeves, 210 F.3d 1041, 1046 (9th Cir. 2000) (quotations omitted). In reviewing the  
9 issuance of a warrant, this court’s duty “is simply to ensure that the magistrate had a substantial  
10 basis for concluding that probable cause existed.” Illinois v. Gates, 462 U.S. 213, 238–39 (1983)  
11 (quotations omitted).

12 Additionally, a defendant may challenge a search conducted pursuant to a warrant on  
13 grounds that the warrant affidavit, while facially adequate to support a finding of probable cause,  
14 contained misstatements of fact or omissions which affected the issuing magistrate’s determination.  
15 Franks v. Delaware, 438 U.S. 154 (1978). A warrant may also be held invalid where the affiant has  
16 “intentionally or recklessly omitted facts required to prevent technically true statements in the  
17 affidavit from being misleading.” United States v. Whitworth, 856 F.2d 1268, 1280 (9th Cir. 1988),  
18 cert. denied, 489 U.S. 1084 (1989) (internal quotation omitted). Under Franks, a defendant must  
19 satisfy a two-part showing in order for a court to find a search warrant invalid. First, the defendant  
20 must show that the affiant’s statement or omission was either intentionally false or misleading or  
21 demonstrated reckless disregard of the truth. Franks, 438 U.S. at 155–56; United States v. Jordan,  
22 291 F.3d 1091, 1100 (9th Cir. 2002). Next, defendant must show that the alleged falsehoods or  
23 omissions were necessary to the issuance of the warrant, such that without the misrepresentations,  
24 the affidavit would not support a finding of probable cause. Franks, 438 U.S. at 155–56; Jordan, 291  
25 F.3d at 1100.

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1        III.     Discussion

2              A.     Failure to Use Words of Incorporation in the Application for the 2005 Warrant

3              Defendant correctly states that the application for the 2005 warrant did not specify the items  
4 to be searched on its face nor did it have any words of incorporation regarding the attachments.

5              Defendant cites to multiple cases that hold warrant attachments valid only if the attachment  
6 physically accompanies the warrant and is incorporated by reference into the warrant. Defendant,  
7 however, cites to no cases creating a similar requirement with respect to *applications* for a warrant.

8              Defendant argues that without words of incorporation the magistrate issuing the warrant had  
9 no idea which items were to be searched. This argument fails because the warrant application  
10 incorporated the attached affidavits by reference, which in turn, requested a search warrant for the  
11 items described in Attachment II. Def's Evid. Exh. F, Burkhart Affidavit at 9. Attachment II then  
12 described with particularity which items were to be searched. This clarifies any confusion the  
13 magistrate may have had with respect to items that were to be searched. Indeed, the warrant the  
14 magistrate issued stated that the items to be searched were described in Attachment II. This  
15 Attachment II is identical to the Attachment II that accompanied the application for the warrant.

16              Compare id., Exh. E, Burkhart Affidavit at Attachment II with id., Exh. F, Attachment II.

17              Furthermore, from a policy perspective, suppression is not the appropriate remedy.

18              Suppression is primarily designed to deter. See United States v. Calandra, 414 U.S. 338, 348 (1974)  
19 ("the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally  
20 through its deterrent effect, rather than a personal constitutional right of the party aggrieved.").  
21 Since a neutral and detached magistrate has no incentive to disregard Fourth Amendment rights, no  
22 deterrence purpose would be served by suppressing the fruits of the 2005 search due to the  
23 magistrate's purported error.

24

25              B.     Inadequate Words of Incorporation in the 2005 Warrant

26              The Fourth Amendment requires that warrants describe with particularity the place and  
27 things to be seized. U. S. Const. amend. IV. The face of the warrant need not be particular so long

1 as a document describing with particularity is incorporated by “suitable words of reference” and  
2 accompanies the warrant. United States v. Hillyard, 677 F.2d 1336, 1340 (9th Cir. 1982).

3 Defendant argues that “See Attachment I” and “See Attachment II” are inadequate words of  
4 incorporation. These words, he argues, do not constitute words that sufficiently identify and  
5 incorporate the relevant information. The adequacy of words of incorporation is a case-by-case  
6 analysis and this court refuses to create a rule whereby magic words of incorporation are necessary.  
7 “See” refers the reader of the warrant elsewhere for the pertinent information. The descriptor  
8 “Attachment I” or “Attachment II” refers the reader to the specific document that contains the  
9 pertinent information. The specificity with which the attachments are numbered make it effortless  
10 for a reader to sufficiently identify and incorporate the relevant information. Thus, this court holds  
11 as a matter of law that the words of incorporation here were adequate.

12 Defendant argues that the government should have summarized, on the face of the warrant,  
13 the description of the place to be searched and the property to be seized. He does not cite to any  
14 authority in this respect. The constitutional particularity requirement, however, suggests that a  
15 summary, by itself, may *sometimes* be inadequate. Since the government is required to describe the  
16 place and property with particularity, the court finds no benefit in summarizing the information and  
17 placing the same on the face of the warrant. This redundancy is a waste of governmental resources  
18 in light of the fact that the attachments must be provided to the defendant upon execution of the  
19 warrant.

20 The court now turns to Lepp’s contention that he was not provided these attachments when  
21 his property was searched.

22  
23 C. Failure to Provide Lepp with the Warrant Attachments at the time of Search

24 “The officer executing the search warrant must: (A) give a copy of the warrant and a receipt  
25 for the property taken to the person from whom, or from whose premises, the property was  
26 taken . . . .” Fed. R. Crim. P. 41(f)(3). Lepp attests he was not presented with the attachments that  
27 accompanied the search warrant when the 2005 search of his property was conducted. Def’s Motion  
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1 to Suppress Fruits of 2004 and 2005 Search Warrants, Exh. F (affidavits of Lepp and his wife  
2 attesting that they were not presented with the attachments and that the same arrived in the mail a  
3 week later). The government alleges in its papers that it allowed the defendant to read the warrant  
4 and attachments before the search was executed and promises to refute this testimony during the  
5 evidentiary hearing. The government, however, presented no evidence to this effect during the  
6 evidentiary hearing.

7 Based on this alleged factual dispute, Lepp argues that the fruits of the 2005 search should be  
8 suppressed.<sup>2</sup> In the Ninth Circuit, “if a person is present at the search of her premises, Rule 41(d)  
9 requires officers to give her a complete copy of the warrant at the outset of the search.” United  
10 States v. Gantt, 194 F.3d 987, 994, 1004 (9th Cir. 1999). In Gantt, the court considered suppression  
11 to be an appropriate remedy because the government conceded that it had not provided defendant  
12 with the warrant attachments at the outset of the search and provided no explanation for the same.  
13 Id. at 994–95. The court further stated that “[v]iolations of Rule 41 do not usually demand  
14 suppression, however. Under Ninth Circuit law, ‘technical’ violations of Rule 41(d) require  
15 suppression only if there was a deliberate disregard of the rule or if the defendant was prejudiced.”  
16 Id. at 994 (internal quotation omitted).

17 More recently, the Ninth Circuit has clarified the standard to state: “There are three  
18 circumstances under which evidence obtained in violation of Federal Rule of Criminal Procedure 41  
19 requires suppression:

20 1) the violation rises to a ‘constitutional magnitude;’ 2) the defendant was prejudiced,  
21 in the sense that the search would not have occurred or would not have been so  
abrasive if law enforcement had followed the Rule; or 3) officers acted in ‘intentional  
and deliberate disregard’ of a provision in the Rule.

22 United States v. Williamson, 439 F.3d 1125, 1133 (9th Cir. 2006) (internal citations omitted). The  
23 court discusses each in turn.

24 Defendant does not contend that the violation rises to a “constitutional magnitude.” The  
25 error, therefore, is a “mere technical error,” and suppression is only appropriate if defendant suffered  
26 prejudice or if the violation was deliberate. See id.

27 “‘Prejudice’ means that the ‘the search would not have occurred or would not have been so  
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1 abrasive if law enforcement had followed the Rule.”” *Id.* (quoting United States v. Martinez-Garcia,  
2 397 F.3d 1205, 1213 (9th Cir. 2005)). Lepp does not contend that no search would have occurred or  
3 that the search would have been less abrasive had the government followed Rule 41(d).

4 Lepp does, however, argue that the agents acted with “intentional and deliberate disregard”  
5 of Rule 41(d) and suppression is therefore necessary. Nevertheless, he failed to present any  
6 supporting evidence at the evidentiary hearing. The case at bar is unlike Gantt since the government  
7 does not concede it neglected to provide Lepp the attachments before the search was conducted.  
8 Even if the agents did not provide Lepp with the attachments before the search, he has made no  
9 showing that the agents acted with intentional and deliberate disregard of the law. Thus, Lepp’s  
10 motion to quash the 2005 warrant on this basis is denied.

11

12 D. Lack of Probable Cause

13 As stated above, agent Burkhart’s affidavit presents the following in support of probable  
14 cause: 1) Lepp told Agent Macanga he would begin replanting marijuana immediately after the 2004  
15 search; 2) aerial surveillance of property purportedly belonging to Lepp; 3) PG&E power usage  
16 records that indicated Lepp’s power usage was 26 times the “baseline”; 4) a new sign of a marijuana  
17 leaf and entwined snake on the fence surrounding Lepp’s property; 5) the purchase of one pound of  
18 marijuana from Lepp; 6) previous 2002 search where three firearms, 9 kilograms of dried marijuana  
19 and 266 live marijuana plants were seized; and 7) previous 2004 search where a loaded firearm, 1.6  
20 kilograms of marijuana and 32,524 live marijuana plants were seized.

21 As stated above, the court limits reason seven to only the 24,784 plants located on the Rural  
22 Property. Nevertheless, the court does not attribute any weight to the prior offenses, reasons six and  
23 seven, since they are not indicative of a current offense and condone a finding of probable cause  
24 based on Lepp’s status as a prior offender. Thus, the court is left with reasons one through five  
25 above.

26 Reason number one must be struck from the affidavit. This court has held the 2004 warrant  
27 defective and therefore any fruits from that search are inadmissible. In light of the government’s  
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1 plain view and open fields argument, some of the evidence seized during that search is indeed  
2 admissible. Nevertheless, other fruits of that illegal search are still inadmissible, including Lepp's  
3 purported statement that he intended to replant marijuana immediately after the 2004 search and  
4 expected to have marijuana plants in active cultivation within a week. Def's Evid. Exh. E, Affidavit  
5 of Brandon Burkhart at ¶ 8. Furthermore, the government has not made any showing as to the  
6 circumstances surrounding the statements made by Lepp. It is unclear whether the statements were  
7 made on the Residential Property or the Rural Property or after arrest. Thus, Lepp's statements  
8 cannot form any part of the basis for probable cause.

9 Reason number two has been heavily contested by the parties. The affiant, when applying  
10 for the search warrant, claimed he "observed what appeared to be several rows of large marijuana  
11 plants growing in a small field on the adjoining parcels located at 9175 and 9176 Upper lake-  
12 Lucerne Road, Upper Lake, CA, and sitting adjacent to the primary residence." Id., ¶ 9. The  
13 government attached two pictures to the affidavit. A review by this court of the pictures does not  
14 provide any probable cause for a search. The poor quality of the pictures would not allow the  
15 magistrate to discern whether the plants depicted are marijuana or not. Therefore, the only relevant  
16 piece of evidence in paragraph nine is the affiant's characterization of the plants as marijuana.

17 The defense makes much of the fact that the affiant, who conducted the aerial surveillance,  
18 does not aver that there are any structures on Lepp's property where marijuana could be cultivated  
19 indoors. The only structures depicted in the pictures, they claim, are not located on Lepp's property.  
20 Assuming that the defense is right, evidence of structures on the land where indoor grow can occur  
21 is not necessary to a finding of probable cause if the affiant testifies he saw marijuana growing  
22 outdoors. This, of course, assumes the affiant was in fact looking at the defendant's land.<sup>3</sup> In light  
23 of the poor quality of the pictures provided, however, the only evidence relevant to probable cause  
24 here is affiant's conclusory identification of marijuana plants purportedly growing outdoors on  
25 Lepp's property. It is notable that the affiant does not state any details about the plants or his  
26 vantage point.

27 Reason number three is arguably misleading. The government neglected to inform the  
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1 magistrate that the “baseline” used was for residential properties, not quasi-commercial or farming  
2 property. This information could negate the negative inference sought because the electricity could  
3 have been used to by irrigation systems to water whatever Lepp was growing on his farmland.  
4 However, the court will not excise this portion of the affidavit since there was a physical brick-and-  
5 mortar residence on the properties to be searched. In light of the residence’s existence, the court  
6 does not find the affiant’s omission demonstrates reckless disregard of the truth.<sup>4</sup> Indeed, the  
7 affidavit specifies that 9175 Upper Lake Lucerne Road incorporates residential premises. Id., ¶ 7.  
8 This also makes irrelevant the failure of the aerial surveillance to identify structures where indoor  
9 grow could occur. Nevertheless, the court is concerned about the probative value of high energy use  
10 without any supporting facts other than that Lepp maintained his residence there. In sum, since the  
11 high energy use could be for illegal indoor grow or legal outdoor farming uses, its probative value  
12 with respect to indoor grow is quite limited.

13 Reason number four must be struck from the affidavit. A sign with a marijuana leaf with an  
14 intertwined snake is of no consequence without further evidence. The government did not present  
15 any evidence that this combination image is used by marijuana growers or dealers. The affidavit  
16 simply states: “The sign bore a large marijuana leaf and entwined snake and textually confirmed that  
17 the property was designated for marijuana production.” Id., ¶ 12. This textual confirmation could  
18 be construed in multiple ways. For instance, it could be the affiant’s subjective views about the sign  
19 or, conversely, it could be the affiant paraphrasing words associated with the sign which stated that  
20 marijuana production occurred at the premises. Without a more detailed description of the sign or  
21 an explanation as to what the affiant meant by his statement, this court cannot assign to a benign and  
22 legal image support for a finding of probable cause.

23 Finally, based on the rationale given below, reason number five—that Lepp recently sold one  
24 pound of marijuana to an undercover agent—was properly averred in the affidavit for a search  
25 warrant. However, the affiant gave only meager evidence in support of probable cause for a search  
26 of Lepp’s home and property. The affidavit states that Lepp returned to his residence to procure one  
27 pound of marijuana; however, the affidavit contains no indication as to the basis for the affiant’s  
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knowledge. Indeed, as explained in the background section below, since only the CI accompanied Lepp to procure the marijuana, it is unclear whether Lepp even returned to his home. Consequently, reason number five provides little support in a finding of probable cause for the search of Lepp's home and property.

In light of the above discussion, the court is left with: 1) the affiant's statement that he saw what appeared to be marijuana on property that supposedly belonged to Lepp; 2) Lepp's electricity usage was many times the PG&E baseline; and 3) Lepp allegedly returned to his home to procure the marijuana he sold to an undercover agent. The affiant's conclusory statement about outdoor marijuana cultivation is not accompanied by any statements regarding his aerial surveillance experience or any details regarding the plants—for example, how tall they were, how many there were and how far away they were from the airplane. This is not enough to find probable cause based on a potential outdoor grow. Similarly, the affiant's desired inference of indoor grow cannot be drawn from the electricity bills because the electricity use could have been for irrigation systems or other farm equipment used on Lepp's property. Indeed, the electricity could have been used to grow the outdoor plants—unidentifiable by the pictures provided to the court—that the affiant saw growing on Lepp's property. Independent of the same, high electricity use, without more, does not provide probable cause for a search. Finally, since there is no indication in the warrant affidavit that Lepp actually returned to his home to procure marijuana that he provided to the undercover agent, the court is unable to find probable cause supporting the issuance of the 2005 search warrant. Consequently, the 2005 search warrant is quashed and defendant's motion to suppress fruits of the 2005 search warrant is granted.

Motion to Suppress Evidence based on the Sixth Amendment

I. Background

On September 28, 2004 Lepp was indicted on narcotics charges. The charges stemmed from a search of his property on August 18, 2004, which led to the seizure of thousands of plants of marijuana. On January 19, 2005 the government was successful in getting Lepp to sell an

1 undercover agent one pound of marijuana. The specifics of this transaction, as illuminated during  
2 the evidentiary hearings held on January 16, 2008 and January 23, 2008, are set forth below.

3       In early October 2004 a confidential informant (“CI”) who had worked with the Drug  
4 Enforcement Agency (“DEA”) on several occasions since 2001 noticed an advertisement by Lepp in  
5 the *Penny Slaver* magazine. The advertisement requested pictures of the August 2004 raid by DEA  
6 agents of Lepp’s property. The CI had, in the past, overheard Lepp brag about cultivating  
7 marijuana. He also admitted to multiple people that he has felt animosity toward Lepp.

8       The CI then, of his own volition, hatched a plan whereby he would establish a rapport with  
9 Lepp by giving him government pictures of the raid. He wanted to dragoon Lepp into the  
10 government’s net by purchasing marijuana from him after establishing a rapport. The CI relayed  
11 this plan to Deputy Sergeant McMahon with the Lake County Sheriff’s Department, who then gave  
12 the CI an internet link to “trophy pictures”—pictures taken by individual police officers independent  
13 of the investigation—of the raid that were on the Sheriff Department’s website.<sup>5</sup> These were the  
14 only pictures given to the CI. Without telling the CI about the pending charges against Lepp,  
15 McMahon put the CI in touch with Mark Macanga, a special agent with the DEA. Macanga was the  
16 case agent during the 2004 search and knew of the pending charges against Lepp. After consultation  
17 with the United States Attorney’s office, Macanga endorsed the plan, but neglected to instruct the CI  
18 not to elicit information regarding the pending charges. Macanga claims he did not intend to have  
19 the CI and the undercover agent talk about the 2004 charges even though he adopted the CI’s idea to  
20 use pictures of the 2004 search as the ruse to entice Lepp. He claims it did not occur to him that  
21 Lepp would want to talk about the pictures.

22       The CI then contacted Lepp and offered Lepp the pictures he received from McMahon. Lepp  
23 agreed. As planned, during their first meeting, the CI told Lepp he found the pictures in a DEA  
24 aircraft during his capacity as an upholstery worker. He then gave Lepp two pictures and brought up  
25 the idea of acquiring marijuana from Lepp. Lepp stated that would not be a problem. Thereafter,  
26 the CI met with Lepp three to four times and gave him two to three pictures each time. During each  
27 meeting, the CI told Lepp that one of his friends wanted marijuana. Lepp did not pay the CI any  
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1 money for these pictures, but Lepp did state that if the pictures were useful, he would name a strain  
2 of marijuana after the CI.

3 On the day of the sale, Lepp agreed to sell the CI one pound of marijuana. At the transaction  
4 location, the CI introduced Lepp to his friend, an undercover DEA agent. This undercover agent  
5 knew that pictures of the 2004 search had been used as a hook to establish a rapport with Lepp. The  
6 undercover agent also knew of the DEA's pending case against Lepp. The discussion that ensued  
7 between the undercover agent and Lepp was recorded and later transcribed. See Def.'s Motion to  
8 Dismiss for Outrageous Governmental Conduct, Exh. A.

9 During the discussion, the undercover agent asked Lepp if he received the pictures from the  
10 2004 raid. He also informed Lepp that he had about fifty pictures of the raid. He then asked  
11 whether the pictures would help Lepp, to which Lepp replied in the negative. The undercover agent  
12 than stated he had audio recordings of the search in the form of "DEA radio frequencies" that he  
13 could provide Lepp if he received assurances from Lepp that his identity would remain confidential.  
14 In exchange, he said he wasn't "looking to get . . . rich" but was "looking to get a good deal on an  
15 elbow [one pound of marijuana]." Lepp then stated he had helped 16% of California's medical  
16 marijuana patients acquire marijuana and assured the undercover agent that his identity would  
17 remain confidential by stating that even though federal agents had been to his place twice, they had  
18 nevertheless been unable to determine the identities of his customers. Id.

19 The undercover agent asked why the DEA was at Lepp's house and also inquired about  
20 Lepp's court date. The agent then inquired about acquiring marijuana. He asked what Lepp had on  
21 hand, to which Lepp replied that he had nothing, and that he was merely a middle-man. The  
22 undercover agent then asked Lepp if the federal agents took everything at the bust, to which Lepp  
23 replied in the affirmative. Nevertheless, Lepp did provide the undercover agent with a sample of the  
24 marijuana that the undercover agent could purchase from Lepp. Id.

25 Lepp then offered to sell the undercover agent a pound of marijuana for \$2,500. Lepp stated  
26 that in another month he would have marijuana for sale in the \$3,500 to \$4,000 range for which  
27 people in Los Angeles were paying \$4,800. After the decision to purchase one pound of marijuana  
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1 had been made, Lepp and the CI went to Lepp's house to acquire the marijuana and the agent stayed  
2 at the transaction location. After the CI declined to deliver the marijuana to the undercover DEA  
3 agent, Lepp remained behind and instructed someone named Jason to drive the CI to the transaction  
4 location. At this site, Jason dropped off the CI and delivered the marijuana to the undercover agent,  
5 who paid Jason. Id.

6 After the transaction, Macanga wrote a "purchase report" memorializing the incident. This  
7 report was based on: 1) the conversation between the undercover agent and Lepp; 2) an interview  
8 with the CI; 3) an interview with the undercover agent; and 4) Macanga's knowledge of the events.  
9 Even though Macanga knew the report would be relied upon by other DEA agents, it contains  
10 numerous errors and omissions. For instance, it states that Lepp admitted he was responsible for  
11 one-fourth of California's medical marijuana when in fact Lepp had stated he had helped one-fourth  
12 of all the medical marijuana patients in California. More importantly, the report failed to mention  
13 the following: 1) the DEA used photos from the 2004 search and promises of audio recordings from  
14 the search to establish a relationship with Lepp; 2) the undercover agent was the one that initiated  
15 conversation about purchasing marijuana; and 3) Lepp mentioned not having any marijuana and  
16 being a mere middleman. Finally, the report mischaracterizes the following: 1) Lepp had indicated  
17 he would keep the undercover agent's identity confidential with respect to the DEA recordings, not  
18 the marijuana purchase; and 2) Lepp had indicated the marijuana he would have in the future goes  
19 for \$4,800 in Los Angeles, not that the undercover agent could sell this marijuana for \$4,800 in Los  
20 Angeles.

21

22 II. Legal Standard

23 The government violates a criminal defendant's Sixth Amendment right to counsel when it  
24 deliberately elicits incriminating information from an indicted defendant who was entitled to the  
25 assistance of counsel. Massiah v. United States, 377 U.S. 201 (1964). The Supreme Court has  
26 interpreted Massiah as holding that a Sixth Amendment violation occurs when the government  
27 "intentionally creat[es] a situation likely to induce [the defendant] to make incriminating statements

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1 without the assistance of counsel.” United States v. Henry, 447 U.S. 264, 274 (1980). The  
2 determinative issue is “not the informant’s subjective intentions, but rather whether the federal law  
3 enforcement officials created a situation which would likely cause the defendant to make  
4 incriminating statements.” United States v. Harris, 738 F.2d 1068, 1071 (9th Cir. 1984).

5 The Massiah doctrine has two elements relevant to the present action: there must be (1) an  
6 “agency” relationship between the government and the informant, and (2) some quantum of  
7 knowledge on the government’s part that its agent was likely to obtain incriminating statements  
8 from the accused. Maine v. Moulton, 474 U.S. 159, 176 (1985).

9 The appropriate remedy for a violation of Massiah includes “not only suppression of all  
10 evidence directly obtained through governmental misconduct, but also suppression of all evidence  
11 that can properly be designated the fruits of that conduct.” United States v. Kimball, 884 F.2d 1274,  
12 1278–79 (9th Cir. 1989). The Massiah rule, however, has been abrogated to permit the government  
13 to continue investigation of the suspected criminal activities of a defendant even though the  
14 defendant has already been indicted. This is because “[t]he police have an interest . . . in  
15 investigating new or additional crimes [post-indictment] . . . [T]o exclude evidence pertaining to  
16 charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence  
17 was obtained, simply because other charges were pending at the time, would unnecessarily frustrate  
18 the public’s interest in the investigation of criminal activities . . . .” Moulton, 474 U.S. at 179–80.  
19 Thus, “Massiah offers no immunity from liability for uncounseled, post-indictment statements that  
20 involve(d) criminal acts or constituted criminal acts in themselves.” United States v. Moschiano,  
21 695 F.2d 236, 240 (7th Cir. 1982) cert. denied, 464 U.S. 831 (1983).

22  
23 III. Discussion

24 It is uncontested that Lepp had been indicted when the sting operation took place. It is  
25 further uncontested that Lepp was represented by counsel at the time. The court now turns to  
26 whether individuals with an agency relationship to the government were involved and whether  
27 incriminating statements were likely to be elicited.

1       First, the confidential informant and the undercover agent were both working in conjunction  
2 with the DEA. The confidential informant stood to gain financially if he was able to entice Lepp  
3 into the sale. The undercover agent was on the DEA payroll. There can be no argument that these  
4 two individuals had an agency relationship with the government. See United States v. Brink, 39  
5 F.3d 419, 423 (3rd Cir. 1994) (stating that an informant is one who is offered money, benefits,  
6 preferential treatment, or some future consideration, including, but not limited to, a reduction in  
7 sentence, in exchange for eliciting information is a paid informant).

8       Second, the ruse created by the confidential informant was premised upon evidence of  
9 charges for which Lepp had already been indicted. The rapport the informant hoped to create was  
10 via the use of material that Lepp had not yet received from the government in his pending case. This  
11 rapport would have to be premised on discussions about the pictures. Thus, undoubtedly in this  
12 situation, the DEA intentionally created a situation likely to induce Lepp to make incriminating  
13 statements without the assistance of counsel. Specifically, the facts here are very similar to Massiah,  
14 where a co-defendant invited defendant Massiah to discuss the pending case with him in his car,  
15 which had a radio transmitter under the front seat. An agent equipped with a recording device was  
16 parked near the co-defendant's car and overheard the transmitted, incriminating conversations.  
17 Here, the undercover agent explicitly invited Lepp to discuss the pending case with him while the  
18 conversation was being recorded. Indeed, the undercover agent asked, with respect to the 2004  
19 search, “[w]hy are they fucking with you?” and “[w]hen do you go to court?” Def’s Motion to  
20 Suppress based on Sixth Amendment, Exh. A at 3–4.

21       Based on the above, all evidence garnered from the 2005 sting operation, as well as all  
22 evidence that can be designated fruits of that conduct, may not be introduced with respect to the  
23 charges against Lepp at the time of the sting operation. Nevertheless, since “Massiah offers no  
24 immunity from liability for uncounseled, post-indictment statements that involve(d) criminal acts or  
25 constituted criminal acts in themselves,” Moschiano, 695 F.2d at 240, the evidence may be  
26 introduced with respect to the newly added distribution charge in the superceding 2005 indictment.  
27 However, since the evidence in the pre-sting and sting counts is intertwined, the court orders the  
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1 counts arising from the sting operation in the 2005 indictment be severed.  
2

3 Motion to Dismiss for Outrageous Governmental Conduct

4 I. Background

5 See Background section supra under the heading, “Motion to Suppress Evidence based on  
6 the Sixth Amendment.”  
7

8 II. Legal Standard

9 The outrageous governmental conduct defense stems from dicta in United States v. Russell,  
10 411 U.S. 423, 431–32 (1973), which noted that the Court might “some day be presented with a  
11 situation in which the conduct of law enforcement agents is so outrageous that due process  
12 principles would absolutely bar the government from invoking judicial processes to obtain a  
13 conviction.” No bright-line rules have been established to determine what type of activity qualifies  
14 as outrageous. United States v. Bogart, 783 F.2d 1428, 1438 (9th Cir. 1986).

15 Prosecution of an offense may be barred when the government’s conduct in the investigation  
16 is so grossly shocking as to violate the universal sense of justice. United States v. Garza-Juarez, 992  
17 F.2d 896, 904 (9th Cir. 1993); see also United States v. Gurolla, 333 F.3d 944, 950 (9th Cir. 2003).  
18 The government’s conduct warrants dismissal of the indictment only if “that conduct is so excessive,  
19 flagrant, scandalous, intolerable and offensive as to violate due process.” Garza-Juarez, 992 F.2d at  
20 904. The focus here is on the “behavior of investigators. This conduct is considered without  
21 reference to any predisposition on the defendant’s part.” Id. at 903.

22 This high standard requiring dismissal is met where undercover government agents “engineer  
23 and direct the criminal enterprise from start to finish,” thereby “[generating] . . . new crimes merely  
24 for the sake of pressing criminal charges against the defendant.” United States v. Ramirez, 710 F.2d  
25 535, 539–40 (9th Cir. 1983); see also Gurolla, 333 F.3d at 950; Bogart, 783 F.2d at 1436. The  
26 standard is also met “where the police conduct involved unwarranted physical, or perhaps mental,  
27 coercion,” Bogart, 783 F.3d at 1438, or when “the government operates, for an extended period of  
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1 time, an actual and illegal apparatus.” Garza-Juarez, 992 F.2d at 904 (internal quotations omitted).

2 Courts have interpreted this standard narrowly, dismissing indictments only in cases of  
3 egregious conduct. Compare Greene v. United States, 454 F.2d 783 (9th Cir.1971) (reversing  
4 convictions where government undercover agents established illegal bootlegging operation,  
5 provided substantial equipment and supplies, ran it for two-and-a-half years and was its sole  
6 customer); with United States v. Smith, 924 F.2d 889 (9th Cir. 1991) (holding that government  
7 agents acted permissibly when encouraging 18-year-old in drug treatment center to deal drugs);  
8 United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987) (finding no outrageous conduct where FBI  
9 used government informant while knowing she had initiated sexual relationship to gain defendant’s  
10 confidences); Ramirez, 710 F.2d 535 (upholding convictions for drug activity in which police had  
11 encouraged defendant to participate as an informant).

12 In United States v. Lomas, 706 F.2d 886, 890–91 (9th Cir. 1983), overruled on other grounds  
13 by Segura v. United States, 468 U.S. 796, 814 n. 9 (1984), as recognized in United States v.  
14 Merriweather, 777 F.2d 503, 506 (9th Cir. 1985), the Ninth Circuit held that in the course of an  
15 undercover narcotics investigation, an agent may provide something of value to a criminal enterprise  
16 to gain the confidence of those involved in illicit activity. In United States v. Wiley, 794 F.2d 514,  
17 516 (9th Cir. 1986), this Circuit held that providing drugs for the transaction did not constitute  
18 outrageous government misconduct. In Wiley, the government used an informant and an FBI agent  
19 posing as a courier to infiltrate a prison drug smuggling operation. The Ninth Circuit found that the  
20 smuggling network was already in place and the government merely activated it to find the route and  
21 couriers. It explained, “[T]he government merely provided an impetus to [the defendants, and] . . .  
22 [u]nder these circumstances, providing the drugs for the transaction did not constitute government  
23 misconduct.” Id.

24 This “standard is not met when the government merely infiltrates an existing organization,  
25 approaches persons it believes to be already engaged in or planning to participate in the conspiracy,  
26 or provides valuable and necessary items to the venture.” Gurolla, 333 F.3d at 950. For instance,  
27 the defense is “generally unavailable where the criminal enterprise was already in progress before  
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1 the government became involved or where the defendant was involved in a continuing series of  
2 similar crimes during the government conduct at issue.” United States v. Stenberg, 803 F.2d 422,  
3 429 (9th Cir. 1986).

4 Finally, “[a] court may exercise its supervisory powers to dismiss an indictment in response  
5 to outrageous government conduct that falls short of a due process violation.” United States v. Ross,  
6 372 F.3d 1097, 1109 (9th Cir. 2004). The prosecutorial misconduct must: “(1) be flagrant and (2)  
7 cause ‘substantial prejudice’ to the defendant.” Id. at 1110 (citation omitted).

8

9 III. Discussion

10 Lepp claims that this court should dismiss charges stemming from the sting operation  
11 because the government exploited his vulnerabilities by providing him pictures depicting the  
12 execution of the 2004 warrant. However, Lepp invited evidence of the execution of the 2004  
13 warrant through his advertisement in a public and freely distributed local paper, the *Penny Slaver*.  
14 Thus, the court does not find that the government targeted Lepp’s physical or mental shortcomings.  
15 Second, Lepp’s argument that the government may never communicate with a represented defendant  
16 without the consent of that defendant’s lawyers goes against established case law that allows  
17 communication with respect to unindicted crimes but not indicted crimes. See Moulton, 474 U.S. at  
18 179–80. The proper remedy for contact with respect to indicted crimes is suppression, and that  
19 remedy has already been utilized.

20 This court agrees with the Ninth Circuit’s holding that “[i]n the course of an undercover  
21 narcotics investigation, an agent may provide something of value to a criminal enterprise to gain the  
22 confidence of those involved in illicit activity.” Lomas, 706 F.2d at 890–91. However, the Ninth  
23 Circuit has not articulated a clear standard as to what types of items the government may lawfully  
24 provide. Thus, this court must determine whether the government’s conduct was outrageous based  
25 on the general standard and pronouncements set forth by governing case law. It is worth noting that  
26 the Lomas standard does not give the government *carte blanche* regarding what items of value may  
27 be provided to gain the confidences of those involved in illicit activity.

28

1        It is undisputed that the government used material from an offense for which Lepp had been  
2 indicted in order to lure him into selling marijuana to the undercover agent. Lepp, who had solicited  
3 exculpatory material through his *Penny Slaver* advertisement, was given the impression that the CI  
4 and the undercover agent had exculpatory material. Indeed, the undercover agent specifically asked  
5 Lepp about the usefulness of the material to Lepp's pending criminal case. When Lepp replied that  
6 the pictures provided thus far were likely not very useful, the agent stated he also had police audio  
7 recordings of the search that he may be able to provide Lepp. In exchange, the agent wanted a good  
8 deal on a pound of marijuana.

9        Here, Lepp was given materials he himself sought. From his first meeting with the CI, Lepp  
10 consistently stated that he could provide marijuana to the CI. At the time of the sale, Lepp was  
11 engaged in criminal activity and intended to have more marijuana for sale within a month. Further,  
12 even though he contended he had no marijuana, he was able to provide the undercover agent a  
13 sample of the marijuana. None of this creates an inference that the government directed the criminal  
14 enterprise from start to finish, nor does it demonstrate unwarranted physical or mental coercion.  
15 Indeed, the government "merely infiltrate[d] an existing organization, approach[ing] persons it  
16 believe[d] to be already engaged in or planning to participate in the [criminal act]." Gurolla, 333  
17 F.3d at 950; see also Stenberg, 803 F.2d at 429.

18        The defense argues that an implicit quid pro quo was formed between the government and  
19 Lepp whereby Lepp was to provide marijuana in exchange for the purportedly exculpatory material.  
20 The undercover agent's statements that he was merely looking to secure an "elbow" for a good price  
21 is certainly evidence of this. Nevertheless, there has been no showing that the nature of the material  
22 used is what makes the government's conduct outrageous. For instance, the undercover agent did  
23 not represent to Lepp that any of the information he could provide would in fact be exculpatory.  
24 Neither was an overt quid pro quo agreement made between the undercover agent and Lepp. Indeed,  
25 there is no showing that Lepp gave the undercover agent a discount on the marijuana.

26        Furthermore, the defense has not demonstrated that the government was required to provide  
27 this material under the standard set forth in Brady v. Maryland, 373 U.S. 83 (1963). Indeed, Lepp  
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1 stated the pictures were not very helpful to his case. Thus, the court is unclear as to what effect, if  
2 any, the quid pro quo agreement has upon the analysis. Under Lomas, the government may provide  
3 things of value to gain the confidences of the purported criminal. There is a limit as to what the  
4 government may provide; however, that limit has not been reached here. In spite of this holding,  
5 outrageous governmental conduct may exist where Brady material is used to entice a criminal  
6 defendant who did not solicit the exculpatory material.

7 The defense makes much of the prejudice suffered by Lepp by arguing that the government's  
8 actions impinge upon Lepp's Fifth Amendment right against self-incrimination. The sting operation  
9 demonstrates Lepp was not using marijuana purely for religious purposes—one of his defenses at  
10 trial. It also impugns the credibility of his character. These arguments, however, merely state the  
11 consequences of Lepp's illegal activities. Indeed, Lepp will likely also be prejudiced by the  
12 sentence he receives if he is convicted. The fact that Lepp will suffer prejudice due to his own  
13 criminal activities that were not coerced or directed by the government does not amount to  
14 outrageous governmental conduct.

15

16 Motion to Reconsider RFRA ruling

17 I. Background

18 On November 6, 2006 defendant Eddy Lepp filed a motion to suppress evidence obtained  
19 from the two searches because the warrants allegedly violated the Religious Freedom Restoration  
20 Act ("RFRA"), 42 U.S.C. section 2000bb et seq. See Docket No. 139. On September 7, 2007 the  
21 court issued an order denying the motion to suppress on RFRA grounds. See Docket No. 193. In  
22 that order, the court quoted Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1994), which stated that a  
23 burden upon religious freedom must be "more than an inconvenience . . . [it] must be substantial and  
24 an interference with a tenet or belief that is central to religious doctrine." Id. at 4 (internal quotations  
25 omitted). On December 3, 2007 defendant filed a motion urging the court to reconsider its decision  
26 because the standard cited above is incorrect.

27

28

1       II.     Legal Standard

2              The RFRA prohibits the government from “substantially burdening a person’s exercise of  
3 religion even if the burden results from a rule of generally applicability.” 42 U.S.C. § 2000bb-1.  
4 The “exercise of religion” was re-defined in 2000 to protect “any exercise of religion, whether or not  
5 compelled by or central to, a system of belief.” Id. §§ 2000bb-2(4), 2000cc5(7)(A).<sup>6</sup>

6

7       III.    Discussion

8              Under the 2000 amendments, interference with a central tenet or belief is no longer required  
9 by the RFRA. Defendant argues that since the court quoted and applied an outdated standard, it  
10 should reconsider its decision.

11             Defendant’s argument does not question the findings upon which the court premised its  
12 holding. Specifically, the court found that the government’s actions did not substantially burden  
13 Lepp’s exercise of freedom. Though the court cited the language in Bryant v. Gomez, it did not base  
14 its decision upon the centrality of Lepp’s belief to the religious doctrine. Indeed, the court stated  
15 that “[f]or the purposes of this motion, the court considers Lepp’s  
16 espoused religious beliefs as genuine and his claimed religion to be one within the meaning of  
17 RFRA.” See Docket No. 193 at 3. The court went on to hold that the government’s actions did not  
18 substantially burden Lepp’s exercise of religious freedom. Id. at 4–5.

19             Since the court’s analysis regarding substantiality remains unchanged, any reconsideration of  
20 the RFRA motion must fail. This is because under the RFRA, any burden must not only affect the  
21 exercise of religion, but substantially affect the same. To the extent that the court referenced a  
22 standard that is no longer applicable and which the court did not employ, the court’s earlier order is  
23 modified to remove reference to such standards.

24

25     CONCLUSION

26             Based on the foregoing, the government’s Motion to Admit Evidence from the 2004 Search  
27 is GRANTED; the defendant’s Motion to Suppress Fruits of 2005 Search Warrant is GRANTED;

28

1 the defendant's Motion to Suppress Evidence based on the Sixth Amendment is GRANTED; the  
2 defendant's Motion to Dismiss for Outrageous Governmental Conduct is DENIED; and the  
3 defendant's Motion to Reconsider the RFRA Ruling is DENIED.

4 In light of the court's order, the only charges remaining against Lepp are charges stemming  
5 from: 1) the 24,784 marijuana plants found on Lepp's Rural Property during the 2004 search; and  
6 2) Lepp's sale of one pound of marijuana to an undercover agent in early 2005. Due to Sixth  
7 Amendment violations, the charges with respect to the outdoor grow are to be severed and tried  
8 separately from the charges with respect to the sale.

9 IT IS SO ORDERED.

10  
11 Dated: March 6, 2008

  
12 MARILYN HALL PATEL  
13 United States District Court Judge  
14 Northern District of California

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## ENDNOTES

- 2     1.     Although this inquiry and the fourth Dunn factor involve similar considerations, the two are  
3     not the same. Unlike the fourth Dunn factor, this inquiry is not restricted by the concept of curtilage.  
4     Rather, it focuses solely on whether the individual has implemented measures to preserve his or her  
land as private. Under certain circumstances, an area may fall outside the curtilage but still have  
Fourth Amendment protection.
- 5
- 6     2.     Lepp argues the same with respect to the 2004 search; however, this court has already  
quashed the 2004 warrant. See Docket No. 150.
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- 8     3.     There is also substantial confusion as to whether the plants depicted in the pictures were  
actually on Lepp's property. Resolution of this issue, however, is irrelevant since the nature of the  
plants cannot be determined through an examination of the pictures provided to the magistrate.
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- 10    4.     There has been no evidence presented that the statements made were intentionally false or  
misleading.
- 11
- 12    5.     There is a question of fact as to whether McMahon sent the pictures to the CI of his own  
volition before the CI saw the advertisement in the *Penny Slaver* or whether he sent the pictures  
upon the CI's request. This requires the court to assess the witness' credibility. The CI was  
motivated by the financial reward awaiting him if he was able to get Lepp to sell marijuana to an  
undercover agent. Indeed, the CI received \$3,950, including \$500 in expenses after this incident.  
Furthermore, the CI admitted that he has a memory disorder due to his multiple sclerosis. Finally,  
the CI has been convicted of three felonies, although he never worked with law enforcement during  
his incarceration. Thus, the court, having evaluated the credibility and motivation of each witness,  
determines that McMahon sent the pictures to the CI upon request and not of his own volition.
- 13
- 14    6.     The parties agree that Navajo Nation v. United States Forest Service, 479 F.3d 1024 (9th Cir.  
2007), rehearing en banc granted, 506 F.3d 717 (9th Cir. 2007), correctly holds that the RFRA  
protects any exercise of religion, whether or not central to a system of religious belief. While the  
court agrees with the holding, it declines to cite to the same as per the Ninth Circuit's order. See  
506 F.3d 717 ("The three-judge panel opinion shall not be cited as precedent by or to this court or  
any district court of the Ninth Circuit, except to the extent adopted by the en banc court.").
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